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No. 08-648

Supreme Court, U.S.
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In The

Supreme Court of the United States

JANICE BREWER,
in her official capacity as Secretary of State of Arizona,

Petitioner,

vs.

RALPH NADER and DONALD N. DAIEN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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The Arizona Secretary of State has requested that this Court grant review in this case to: (1) resolve the split among the lower courts and answer the question expressly left open in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 183 (1999), concerning whether State residency requirements for petition circulators comply with constitutional requirements; and (2) resolve a conflict between the Ninth Circuit and the Arizona Supreme Court concerning the constitutionality of Arizona's deadline by which independent candidates for President must file nomination petitions.

These important issues center on when strict scrutiny applies to the analysis of State election laws. This Court has repeatedly recognized and affirmed that States need flexibility to exercise their responsibility to establish policies governing elections. Because of that need for flexibility, strict scrutiny is generally not appropriate absent a showing that a State law severely burdens the challenger's rights. *See, e.g., Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008). The Ninth Circuit decision invalidating Arizona's filing deadline for independent candidates for President and its prohibition on out-of-state petition circulators does not comport with this Court's election law jurisprudence because it applied a strict scrutiny analysis absent evidence that the State laws in question severely burdened Respondents' constitutional rights. The court's analysis of the residency requirement also fails to recognize the State's compelling interests in requiring petition

circulators to be state residents. This Court should grant review and reverse the Ninth Circuit's decision.

I. This Court Should Review the Ninth Circuit Decision Invalidating Arizona's Residency Requirement for Petition Circulators to Resolve Disagreements Among Lower Courts and Address an Issue That This Court Expressly Left Open in *Buckley v. American Constitutional Law Foundation, Inc.*

Respondents do not dispute the two fundamental reasons Arizona's Secretary of State asks this Court to review the Ninth Circuit decision invalidating Arizona's residency requirement for petition circulators. First, Respondents do not dispute that in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), this Court expressly left open the question of whether a State residency requirement is constitutional. *See Buckley*, 525 U.S. at 197 (noting that residency requirement was not at issue in that case). Second, Respondents do not dispute that, since *Buckley*, the lower courts have reached conflicting decisions regarding state residency requirements.

Although Respondents attempt to minimize the significance of the division among by the lower courts, Respondents do not deny that a conflict exists. In a recent decision on the subject of circulator residency requirements, the Sixth Circuit candidly acknowledged that the circuit courts "have divided as to their

constitutionality." *Nader v. Blackwell*, 545 F.3d 459, 477 (6th Cir. 2008). The Sixth, Seventh, Ninth and Tenth Circuits have applied strict scrutiny and invalidated state residency requirements, but the Eighth Circuit declined to apply strict scrutiny and upheld a state residency requirement as a reasonable regulation to protect the integrity of the petition circulation process. *Compare Nader*, 545 F.3d at 475; *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028-1031 (10th Cir. 2008); *Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008); *Krislov v. Ridenour*, 226 F.3d 851 (7th Cir. 2000) (applying strict scrutiny and rejecting state residency requirements) *with Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614, 618 (8th Cir. 2001) (declining to apply strict scrutiny and upholding state residency requirement).[1]

State courts and district courts have also reached inconsistent decisions regarding state residency requirements. *Compare Frami v. Ponto*, 255 F. Supp. 2d 962, 970 (W.D. Wis. 2003) (invalidating Wisconsin's residence requirement) *with Idaho Coalition United for Bears v. Cenarrusa*, 234 F. Supp. 2d 1159, 1164 (D. Idaho 2001) (declining to apply strict scrutiny and upholding Idaho residency requirement for

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[1] Respondents incorrectly cite *Perez-Guzman v. Garcia*, 346 F.3d 229 (1st Cir. 2003) as a decision that supports the circuits that have rejected residency requirement for petition circulators. That case invalidated a requirement that attorneys notarize petition signatures for political parties to gain representation on the ballot. The court acknowledged that Puerto Rico's notarization requirement was unique. *Perez-Guzman*, 346 F.3d at 231.

initiative petition circulators); *Hart v. Sec'y of State*, 715 A.2d 165, 167-68 (Me. 1998) (upholding Maine's residency requirement); *Kean v. Clark*, 56 F. Supp. 2d 719, 730-33 (S.D. Miss. 1999) (applying strict scrutiny and upholding Mississippi residency requirement).

In addition, courts invalidating local residency requirements have often recognized that State residency requirements may satisfy constitutional requirements. *See Lerman v. Bd. of Elections*, 232 F.3d 135, 146-50 (2d Cir. 2000) (striking down local residency requirement and noting that state's interest was served by the "less burdensome requirement[ ]" of state residency); *Morrill v. Weaver*, 224 F. Supp. 2d 882, 903 (E.D. Pa. 2002) (rejecting in-district residency requirement but suggesting state interests could be served by state residency requirement); *KZPZ Broadcasting, Inc. v. Black Canyon City Concerned Citizens*, 13 P.3d 772, 778-79 (Ariz. App. 2000) (invalidating local residency requirement but "[a]ssuming, without deciding, that a state residency requirement would be upheld").

These decisions illustrate the confusion among lower courts regarding the appropriate analysis of state residency restrictions for petition circulators. The Ninth Circuit erred in this case by applying strict scrutiny absent any evidence that the State residency requirement burdened Nader or his supporters. This Court's decision in *Buckley* does not require strict scrutiny of every requirement that limits who may circulate petitions. Instead, following the approach in such cases as *Burdick v. Takushi*, 504 U.S. 428

(1992), *Timmons v. Twin Cities Area New Party,* 520 U.S. 351 (1997) and *Anderson v. Celebrezze,* 460 U.S. 780 (1983), courts should analyze the extent to which the State's requirement burdens the challenger's ability to communicate their message or gain access to the ballot. This Court recognized in *Buckley* that "no litmus-paper test will separate valid ballot-access provisions from invalid restrictions." *Buckley*, 525 U.S. at 192 (internal quotations omitted). Challengers should be required to show that a State residency requirement for petition circulators poses a severe burden on their rights in order to trigger strict scrutiny review.

Establishing the correct approach to the analysis of residency requirements for petition circulators is crucial to States which are responsible for protecting the integrity of elections within their jurisdiction. These issues affect a significant number of jurisdictions. Nineteen States and the District of Columbia have residence requirements for petition circulators. *See* Amicus Br. of Montana, et al., at 8. These States have enacted residency requirements as an "integrity-policing matter." *Buckley,* 525 U.S. at 197. Even if this Court determines that a residency requirement must satisfy strict scrutiny review, it should recognize the State's compelling interest in adopting residency requirements for petition circulators to combat election fraud.

In opposing the Petition for Certiorari, Respondents trivialize the role of State policy makers in protecting the integrity of election processes. Respondents

question the need for any regulation of petition circulators at all, assert that the State can subpoena any non-resident if necessary, speculate that requiring out-of-state circulators to agree to service of process within the state might provide adequate protection for a state, and suggest that other anti-fraud mechanisms might be more effective than a prohibition against out-of-state circulators. Resp. Br. at 19-20. Despite Respondents' efforts to minimize the importance of the problem, it is undeniable that petition fraud occurs in Arizona and elsewhere. *See, e.g., Nader,* 545 F.3d at 463-65 (describing Ohio's invalidation of Ralph Nader petition signatures based on signature forgery, failure of circulators to witness signatures, and false residences provided by circulators, among other reasons); Pet. App. A at 20a (disregarding petition fraud in Arizona that was not caused by out-of-state petition circulators); Montana et al., Amicus Br. at 12-15 (describing petition fraud in other states). As explained in the Petition (19-20), lower courts have failed to follow the analysis of anti-fraud measures that this Court applied in *Crawford*, 128 S.Ct. at 1613, 1618-19. This Court's review is necessary to provide direction to lower courts regarding the proper analysis of State residence requirements for petition circulators.

II. The Court Should Review the Ninth Circuit Decision Invalidating Arizona's Filing Deadline for Independent Candidates for President to Resolve a Conflict With the Arizona Supreme Court and Provide Guidance to Lower Courts.

Arizona seeks review of the Ninth Circuit decision invalidating its filing deadline for independent candidates for President because it conflicts with an Arizona Supreme Court decision that upheld the filing deadline and because it does not apply the analytical framework this Court uses to analyze the constitutionality of state election laws.

Although Respondents argue that in *Browne v. Bayless*, 202 Ariz. 405, 406 P.3d 416 (2002), the Arizona Supreme Court found only that the filing deadline was "permissible when a party switcher tried to use the ballot access as a way of circumventing internal state party convention recognition" (Resp. Br. at 30-31), *Browne*'s holding was not limited to those facts. In *Browne*, the Arizona Supreme Court applied this Court's precedent and determined that Arizona's filing deadline for independent candidates satisfied constitutional requirements. *Browne*, 46 P.3d at 419. The Ninth Circuit, applying the same precedent to the same state law, reached the opposite conclusion. As a result, there is a conflict that this Court should resolve.

Respondents incorrectly assert that the Petition "misstates critical facts found by the Ninth Circuit." Resp. Br. at 25. Specifically, Respondents suggest that

the Petition wrongly claims that Respondents failed to establish that the June filing deadline imposed any burden on their First Amendment rights, and they note that the Ninth Circuit recognized that no independent presidential candidates had qualified for the ballot in Arizona since the State moved the filing deadline to June. *Id.* The Petition's statement regarding the lack of evidence in this case is accurate. Respondents presented no evidence that showed that the filing deadline was in any way a barrier to qualifying for the ballot in Arizona. There was, however, evidence that the Nader campaign failed to make any reasonable effort to secure the necessary petition signatures in Arizona. (Pet. at 25; App. B at 12b-13b.) The Ninth Circuit's concern about the failure of independent candidates for President to qualify for the ballot in Arizona since the change in the filing deadline in 1993 was unwarranted. The 2004 election was only the third presidential election since Arizona changed its filing deadline in 1993. And, in the 2008 election cycle, Ralph Nader successfully qualified as an independent candidate for president.

Respondents also incorrectly argue that strict scrutiny is appropriate when analyzing filing deadlines because independents are "insular unrepresented minorities." Resp. Br. at 25. To the contrary, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court carefully analyzed "the character and magnitude of the asserted injury" when determining the appropriate level of scrutiny. *Anderson*, 460 U.S. at 789. The Court recognized that regulation

is necessary if elections "are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* at 788 (internal quotations omitted). This Court has never held that independent voters are a protected class and that any laws affecting them are subject to heightened scrutiny.

Respondents' brief in opposition argues without support that Arizona's filing deadline is an effort to limit voter choice and criticizes Arizona's signature requirements for independent candidates. Resp. Br. at 22-23, 25. But in defending the Ninth Circuit's decision Respondents offer no coherent principles for analyzing state filing deadlines. They assert that in *Anderson*, this Court "expressly found that seventy-five days should give the Secretary of State adequate time to prepare and print the general election ballot." Resp. Br. at 23. But, *Anderson* adopted no such bright-line rule. They also argue that "[m]ost states have August or later deadlines" and that "[t]he primary fixes the true deadline the state needs for printing ballots." Resp. Br. at 24. They also assert that the June filing deadline is a severe burden "because it pre-dates the conventions by months, during the 'dead' period of presidential politics." *Id.* at 26. They never assess the burdens of Arizona's filing deadline on independent candidates based on evidence or measure the State's evidence regarding its legitimate interests in an orderly election. The Ninth Circuit decision in this case suffered the same deficiencies. The Ninth Circuit observed that *Anderson*,

which rejected a March filing deadline, "remains binding Supreme Court authority," but it failed to apply the analysis that *Anderson* required.

In sum, the Ninth Circuit decision conflicts with an Arizona Supreme Court decision and contradicts the principles of *Anderson* and its progeny. Review should be granted to provide guidance to the lower courts regarding the proper analysis of candidate filing deadlines.

CONCLUSION

For the reasons set forth above and in the Petition, the Arizona Secretary of State requests that this Court grant the petition for writ of certiorari in this case.

Respectfully submitted,

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